

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

RONALD GRAIG SMITH, #1815107,

Petitioner,

v.

DIRECTOR, TDCJ-CID,

Respondent.

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Case No. 6:19-CV-85-JDK-JDL

**ORDER ADOPTING REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

Petitioner Ronald Smith, an inmate of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding pro se, filed this petition complaining of the legality of his conviction. Docket No. 1. The Court referred the matter to United States Magistrate Judge John D. Love for consideration pursuant to 28 U.S.C. § 636. The Magistrate Judge recommends dismissal of the petition. As explained below, the Court adopts the Magistrate Judge's recommendation.

On April 16, 2013, Petitioner was convicted by a jury of felony driving while intoxicated, enhanced by two prior felony convictions. He received a sentence of life in prison. After pursuing his state remedies by direct appeal and habeas corpus, on April 6, 2015, Petitioner filed a federal habeas corpus petition challenging his conviction. Petitioner argued, among other things, that the evidence of his blood draw should have been excluded in the state trial because the blood draw was unlawful under *Missouri v. McNeely*, 569 U.S. 141 (2013). On September 29, 2016, the Court dismissed the petition with prejudice because the Magistrate Judge found that, even if the evidence of the blood draw had been excluded, there was considerable other evidence of intoxication supporting the jury's guilty verdict. *See Smith v. Director, TDCJ-CID*, No. 6:15-cv-386, 2016 WL

5475828 (E.D. Tex. Sept. 29, 2016). The Fifth Circuit Court of Appeals then denied Petitioner a certificate of appealability and leave to proceed *in forma pauperis* on appeal. *Smith v. Davis, Director, TDCJ-CID*, No. 16-41459 (5th Cir. Sept. 11, 2017).

On March 5, 2019, Petitioner submitted his current federal habeas corpus petition, challenging the same conviction. The Magistrate Judge recommends dismissal because Petitioner failed to obtain an order from the Fifth Circuit authorizing the district court to consider a second or successive application, as required by 28 U.S.C. § 2244(b)(3). Docket No. 9. Indeed, although Petitioner sought leave to file a successive petition, the Fifth Circuit denied his motion on May 8, 2019. *In re Ronald Graig Smith*, No. 19-40159 (5th Cir. May 8, 2019). Without an order from the Fifth Circuit, the Magistrate Judge concluded, this Court lacks jurisdiction to consider his claims. *See Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003).

Petitioner filed objections to the Report and Recommendation. In his objections, Petitioner concedes that the Fifth Circuit denied him leave to file a successive petition, but argues that the Court still has jurisdiction here. Docket No. 11 at 1. He primarily contends that the state court (the 241st Judicial District Court of Smith County, Texas) committed fundamental error by denying his state habeas petition because the blood draw was unconstitutional and he received ineffective assistance of counsel. *Id.* These arguments, however, were raised in Petitioner's original federal habeas petition, which this Court already denied, and they do not address Petitioner's failure to comply with 28 U.S.C. § 2244(b)(3). *In re Ronald Graig Smith*, No. 19-40159 (5th Cir. May 8, 2019).

In one line, Petitioner also seems to challenge his conviction based on a claim of actual innocence. Docket No. 11 at 1. However, Petitioner cannot evade the statutory requirement of obtaining leave to file a successive petition through a conclusory claim of actual innocence. *In re*

Warren, 537 F. App'x 457, 2013 WL 3870423 (5th Cir. 2013).

Having made a de novo review of the objections raised by Petitioner, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and that Petitioner's objections are without merit. The Court therefore adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly


ORDERED that the Report and Recommendation (Docket No. 9) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the Petitioner's complaint, construed as an application for the writ of habeas corpus, is **DISMISSED WITH PREJUDICE** as to its refiling without obtaining permission from the Fifth Circuit, but without prejudice as to its refiling once such permission has been obtained. It is further

ORDERED that a certificate of appealability is **DENIED**, with such denial referring solely to an appeal of this case and having no effect upon Petitioner's right to seek permission from the Fifth Circuit to file a successive petition. It is further

ORDERED that any and all motions which may be pending in this civil action are hereby **DENIED**.

So **ORDERED** and **SIGNED** this **19th** day of **November, 2019**.


JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE